IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D22–2032

USAA CASUALTY INSURANCE COMPANY,

Appellant,

v.

HEALTH DIAGNOSTICS OF FT. LAUDERDALE
D/B/A STAND UP MRI OF FT. LAUDERDALE,
A/A/O MARTHA J. ANDERSON,

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM AN ORDER DETERMINING ATTORNEY'S FEES ENTERED IN THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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INTRODUCTION

Appellant is challenging a final judgment on attorney's fees entered following an evidentiary hearing. And critical to the Court's analysis: The trial court relied on the only invoice Appellant submitted and awarded its full amount. So, Appellant shouldn't have anything to complain about. Indeed, Appellant's appeal largely centers around an issue abandoned below.

In a nutshell, Appellant initially (prior to and leading up to the evidentiary hearing) relied on a written engagement agreement with respect to attorney's fees. But at the hearing, Appellant jettisoned its reliance on the written agreement, instead relying on an alleged oral agreement (which would allow it to recover greater fees). The trial judge, facing a party that "reversed [its] position" during the operative evidentiary hearing, sided with the only competent, substantial evidence left. That is, the only invoice for services rendered.

The abuse of discretion standard of review that this Court must apply to the trial court's final judgment on fees — with the nested abuse of discretion standard applicable to the trial court's evidentiary rulings and the competent substantial evidence standard applicable to the trial court's ultimate findings of fact — compels affirmance.

STATEMENT OF THE CASE AND FACTS

I. THE COUNTY COURT'S FINAL JUDGMENT ON APPELLATE FEES.

This case arises out of a litigation over personal injury protection ("PIP") benefits, in which the Appellant, USAA Casualty Insurance Company (hereinafter referred to as "USAA" or "Appellant") prevailed in the County Court of the Eleventh Judicial Circuit Court (the "County Court") following an appeal to the Appellate Division of the Eleventh Judicial Circuit Court (the Circuit Court Appellate Division").[1] Record on Appeal ("R") at 495.

This appeal revolves around the amount of attorney's fees and costs awarded to USAA following a multi-part evidentiary hearing that culminated several years of litigation involving fees awarded under section 768.79, Florida Statutes, Florida's offer of judgment statute.

The following additional facts are offered to add context to the trial court's Final Judgment on Fees and shed light on the trial court's findings of fact and assessment of witness credibility, which ultimate lead it to reducing the amount of fees sought by USAA.

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[1] In conjunction with its decision on the merits, the Circuit Court Appellate Division entered an order determining USAA's entitlement to appellate attorney's fees, and remanding the matter to the County Court to fix the amount of such appellate fees. The basis for USAA's motion for fees consisted of a proposal for settlement filed by USAA in the trial court. R:495. The Circuit Court Appellate Division's order apparently determined the viability of the proposal and remanded the issue back to the trial court to determine the amount of fees.

II. THE LITIGATION OVER ATTORNEY'S FEES.

On February 6, 2019, USAA filed its Motion to Determine Entitlement to Reasonable Attorney's Fees and Costs, based on its offer of judgment under section 768.79 of the Florida Statutes. R:28–51. *And see* R:206–479 (USAA's supplemental motion). Using the Circuit Court Appellate Division's order granting appellate fees as a springboard, USAA argued that its offer of judgment was valid and the offer of judgment statute allowed it to recover its "reasonable costs and attorney's fees *incurred*" on its behalf at the trial level as well. R:31–32 (citing § 768.79, Fla. Stat. (2021), with emphasis added).

The trial court granted USAA's entitlement and reserved jurisdiction to determine the amount of costs and fees *incurred* by USAA. R:487–504.

Thereafter, the parties engaged in discovery of any relevant matters pertaining to USAA's request for fees. R:505–530. Two important matters were produced in discovery that ultimately played a role in the trial court's determination of reasonable fees for USAA:

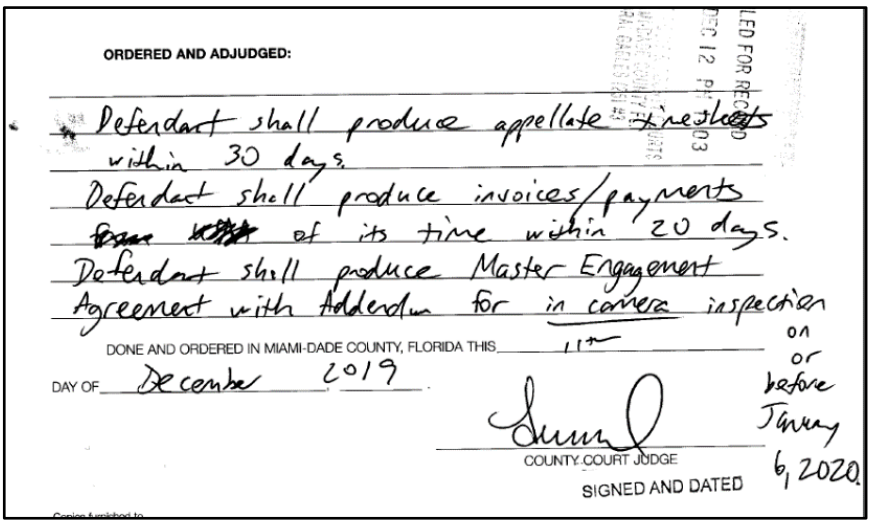
(i) USAA's Flat Fee Agreement with Dutton Law Group (its trial counsel); and

(ii) USAA's Master Agreement with Dutton Law Group.

Both matters will be discussed below.

THE FLAT FEE AGREEMENT

The trial court ordered USAA to produce its "invoices/payments of its time within 20 days" of the order, so that it could determine the amount of fees incurred by USAA. R:669. That order is reproduced below:



ORDERED AND ADJUDGED:

Defendant shall produce appellate timesheets within 30 days.
Defendant shall produce invoices/payments of its time within 20 days.
Defendant shall produce Master Engagement Agreement with Addendum for in camera inspection on or before January 6, 2020.

DONE AND ORDERED IN MIAMI-DADE COUNTY, FLORIDA THIS 11th DAY OF December 2019.

COUNTY COURT JUDGE

SIGNED AND DATED

FILED FOR RECORD DEC 12 PM 03

R:669.

In response, USAA produced a **single invoice**, reflecting a $4,000 flat fee payment to Dutton Law Group, USAA's trial counsel, and confirmed its compliance with the trial court's order when it produced that invoice:

> **DEFENDANT'S NOTICE OF COMPLIANCE WITH COURT ORDER REGARDING INVOICES/PAYMENTS FOR DEFENSE TIME**
>
> Comes now Defendant, USAA Casualty Insurance Company, and hereby serves this notice of compliance with this Honorable Court's Order of December 11, 2019 regarding Invoices or Payments for Defense time expended.
>
> **1. See attached, invoices from Dutton Law Group to USAA Casualty Insurance Company for travel time and flat fee payment, as well as timesheets and invoices regarding appellate time.**

R:670 (the "Flat Fee Agreement").

And leaving no room for mistake, USAA clearly described the $4,000 invoice payment as a "flat fee payment." *See* R:670.

THE MASTER ENGAGEMENT AGREEMENT

In response to Stand Up MRI's discovery request, USAA revealed that it had a "Master Engagement Agreement" with Dutton Law Group. R:529. USAA maintained that the Master Engagement Agreement was privileged, but reproduced a part of the Agreement that allowed Dutton Law Group to secure an alternative fee agreement if it were successful in defending USAA in a legal action or under section 768.79. R:529. That portion of the Master Engagement Agreement is reproduced below:

> USAA Offers a contingency as follows that will increase the hourly rate as an added incentive to judiciously pursue the defense of the case: In those cases where the Firm positions USAA as the prevailing party in the action under any theory allowable under law, such as securing a judgment in favor of USAA in trial, summary judgment, motion to dismiss, or any other motion that disposes of further legal action on the case, or, secures a voluntary dismissal of the action from the plaintiff with or without prejudice, or prevails pursuant to F.S. 57.105, 768.79 or 1.442, or other theory authorized by law either in trial or appellate court, the Firm is entitled to the following hourly rate:
>
> | | |
> |---|---|
> | Partners: | **$300** per hour |
> | Senior Associates: | **$275** per hour |
> | Associates: | **$250** per hour |
> | Paralegals: | **$110** per hour |
>
> ***Or, the amount awarded by the Court as a reasonable fee, whichever is greater***." (Emphasis added).

R:819.

The trial court performed an *in camera* inspection of the Master Engagement Agreement and determined that "the necessity of the production outweighs the interest in maintaining [the] confidentiality" of the document. R:680. Accordingly, the trial court ordered USAA to produce the Agreement to Stand Up MRI for review prior to the fee amount hearing, while assuring that it would take "protections" necessary to prevent the disclosure of the information. R:681.[2]

Following Stand Up MRI's review of the Master Engagement Agreement, Stand Up MRI took the position that the Agreement did not represent a retainer agreement between USAA and the Dutton Law Group for the litigation at issue. R:689. Dutton Law Group disagreed. R:689. Indeed, USAA represented that, despite the $4,000 "flat fee agreement" turned over in discovery, it did not have a "written flat fee agreement between Dutton Law Group and [USAA]." *Id*. Instead, USAA represented that the Master Engagement Agreement "is the only written retainer agreement, employment contract or contract for representation between Dutton Law Group and Defendant." *Id*.

* * *

The clash between the Flat Fee Agreement and the Master Engagement Agreement came to a head in a preliminary ruling by the trial

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[2] Stand Up MRI was only permitted to inspect the Master Engagement Agreement at the offices of USAA's trial counsel. R:680–681.

court on Stand Up MRI's motion to limit the amount of fees to the Flat Fee Agreement. *See* R:730–735.

The parties had clearly staked out their positions.

Stand Up MRI argued that the only evidence of an invoice submitted by Dutton Law Group to USAA was the $4,000 invoice — "Dutton Law Group did not work under any written fee agreement, did not submit bills to Defendant pursuant to a written fee agreement, did not have any established hourly rate for this case under a written fee agreement." R:731. Stand Up MRI argued that the Master Fee Agreement applied "from June 2010 through May 2013" and thus predated the litigation and that the Dutton Law Group never "countersigned" the Agreement, making it invalid. R:732–733.

On the other hand, USAA maintained that the Master Fee Agreement is a "binding contract under the law" and rightfully allowed it to seek fees under the alternative fee agreement therein. R:815–890.

The trial court sided with USAA. R:1081–1090. The trial court ruled that the Flat Fee Agreement between USAA and Dutton Law Group "would not override the prior terms of the" Master Fee Agreement, "especially as it related to the alternative fee provision as stated in the Addendums." R:1083. The trial court stated that it found the Master Fee Agreement "to be written, enforceable, and encompassing for these circumstances." R:1086. And based on the alternative fee agreement, the trial court allowed USAA to proceed to proving its amount of fees. R:1087–1089.

III. THE ATTORNEY'S FEE HEARING.

Things changed when the parties proceeded to a hearing on USAA's motion to fix the amount of attorney's fees consistent with the alternative fee agreement in USAA's Master Engagement Agreement.

Up to that point, USAA requested compensation for over 123 hours of time and over $68,850 in fees for the work put in by Dutton Law and others. R:715; R:1114–1115. Forebodingly, USAA derived that lodestar number through an expert who exceeded the reasonable hourly rate provided by the Master Engagement Agreement's alternative fee agreement:

USAA'S EXPERT'S REASONABLE RATE DETERMINATION

9. In my opinion, the following are reasonable hourly rates for the attorneys who billed time in this matter:

Initial	Attorney	Reasonable Hourly Rate
ALT	Anthony L. Tolgyesi	$600.00
JGM	John G. Miller	$500.00
KJS	Kathryn J. Strobach	$450.00
LSS	Louis S. Schulman	$500.00
ROT	Rebecca O'Dell Townsend	$450.00
SWD	Scott W. Dutton	$700.00
DHS	Douglas H., Stein	$750.00

R:715.

THE MASTER ENGAGEMENT AGREEMENTS RATES

> USAA Offers a contingency as follows that will increase the hourly rate as an added incentive to judiciously pursue the defense of the case: In those cases where the Firm positions USAA as the prevailing party in the action under any theory allowable under law, such as securing a judgment in favor of USAA in trial, summary judgment, motion to dismiss, or any other motion that disposes of further legal action on the case, or, secures a voluntary dismissal of the action from the plaintiff with or without prejudice, or prevails pursuant to F.S. 57.105, 768.79 or 1.442, or other theory authorized by law either in trial or appellate court, the Firm is entitled to the following hourly rate:
>
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> | Partners: | **$300** per hour |
> | Senior Associates: | **$275** per hour |
> | Associates: | **$250** per hour |
> | Paralegals: | **$110** per hour |
>
> ***Or, the amount awarded by the Court as a reasonable fee, whichever is greater***." (Emphasis added).

R:819.

And much like a standard fee dispute, Stand Up MRI hired its own expert who reviewed USAA's invoices and determined what he viewed as compensable, reasonable hours and rates. R:1111–1125; R:1169–1204.

Then came the fee hearing.

At the fee hearing, USAA through its trial counsel, Dutton Law, jettisoned the Master Engagement Agreement (and thereby the alternative fee agreement clause within). R:1402–1411. Instead, for the first time, Mr. Dutton testified that Dutton Law "had a verbal contingency fee agreement" as USAA's *defense* counsel. R:1400–1411. That verbal contingency fee agreement, argued Dutton Law, entitled its attorneys to bypass the hourly rate contained in the Master Engagement Agreement and

recover nearly triple the market rate for defense lawyers handling similar claims. R:1835.

As for the Master Engagement Agreement, USAA refused to put it into evidence; USAA argued that it was protected by "attorney-client privilege" and (despite the trial court's earlier rulings) was "irrelevant to these proceedings." R:1412. Stand Up MRI asked USAA directly if it was claiming "fees above the $4,000" Flat Fee Agreement "pursuant to the terms of the [M]aster [E]ngagement [A]greement." R:1412. USAA, through Dutton Law, unequivocally stated that the Master Engagement Agreement had nothing to do with the fee proceedings:

> MR. DUTTON: And irrelevant to the proceedings. And irrelevant to just the conditions of compensation by in between our law firm and our client.
>
> * * *
>
> MR. DUTTON: I'm not referring to it. Your Honor, I will not be referring to it.

R:1413.

Asked by the trial court to clarify exactly what USAA meant when it stated that the Master Engagement Agreement was irrelevant, Dutton Law described exactly what it intended:

> MR. DUTTON: Your [Honor], the master engagement agreement, again, for purposes of the record, is an attorney-client privileged document. That it doesn't embody what Mr. Berger has just said.

> He's mischaracterized, misstated anything that may be contained within that document. It's irrelevant to these proceedings. These proceedings travel upon a different arrangement than has been alluded to by Mr. Berger in his cross examination.

R:1414–1415. Despite relying on the Master Engagement Agreement earlier in the fee proceedings, USAA "[a]t this point" was no longer "relying on the master engagement agreement" to prove the reasonable amount of fees it should recover. R:1415.

Following that exchange, Stand Up MRI admitted the $4,000 Flat Fee Agreement into evidence, without objection by USAA. R:1416–1419. USAA denied that it represented a "written flat fee agreement" between USAA and Dutton Law. R:1417.

The fee hearing proceeded after that concession, with each expert stating their opinions as to USAA's reasonable lodestar fee. R:1465–1600. However, Stand Up MRI's expert witness clarified that his entire testimony was based upon the understanding that the Master Engagement Agreement was relevant and applicable to USAA's claim for fees. R:1483–1485. Without that Agreement entered into evidence, the witness could no longer provide relevant testimony as to USAA's hourly rates or otherwise calculate a reasonable lodestar:

> THE WITNESS: Your Honor, my understanding was that Mr. Dutton was relaying on the master's engagement agreement. And under the master engagement agreement it was my understanding he was relying on, till this morning when he said it had nothing to do within, it was not relevant. The partners were

> being billed at $135, the associate were been billed out $115 and the paralegals were being billed out at $70.
>
> So, those are the rates. That's why I didn't go individually to anybody else's rates because those were the rates that I believe were at issue, despite what Mr. Vaccaro said. And if I may or is he ready, I'm ready for his objection.

R:1483.

> THE WITNESS: Again, it does or it doesn't. I'm not being an advocate, I'm just trying to figure out what -- I mean, I can only give an opinion on what I hear and I had the ability and I have the right to listen to the testimony while giving my opinions but my opinion was based on the fact that the master engagement agreement was relevant and that's what he was claiming to and that has shows partners at $135, $115 for associates and paralegal at $70. That's what my opinion was, I didn't challenge that.

R:1484.

The remainder of the witnesses provided their testimony regarding reasonable rates and hours.

IV. THE FINAL JUDGMENT ON ATTORNEY'S FEES.

The trial court entered its Order on Defendant's Motion to Tax Fees and Costs (the "Fee Order") awarding USAA its attorney's fees based upon the Flat Fee Agreement. R:1833–1838. The trial court laid out the full procedural and evidentiary history leading up to the Fee Order, including USAA's change in position regarding the Master Engagement Agreement.

First, the court noted that on "March 3, 2022, the court held a hearing on Plaintiff's Motion to Limit Defendant's Reasonable Attorney's Fees and

Costs and Defendant's Response in Opposition. This Court denied Plaintiffs Motion and made a finding that Defendant was entitled to obtain its reasonable attorney's fees, pursuant to the Master Engagement Agreement." R:1834.

Second, the court described what occurred at the Fee Amount Hearing: "USAA's counsel, Dutton Law Group, produced timesheets claiming over one hundred twenty hours and requested hourly rates up to seven hundred dollars an hour. It is undisputed that these timesheets were never submitted to USAA for payment but were produced for the first time after the order on entitlement." R:1835.

"During the fee discovery portion of this case, Dutton Law Group alleged repeatedly that a 'Master Engagement Agreement' between USAA and Dutton Law Group applied and entitled the Dutton Law Group to market rate fees under a lodestar notwithstanding the verbal flat fee agreement. Defendant argued that the Master Engagement Agreement (which was not signed by both parties) applied to Dutton Law Group's representation in the case at bar and that the agreement contained an alternative fee agreement or fee accelerator provision in compliance with *First Baptist Church of Cape Coral, Florida, Inc. v. Compass Const., Inc.*, 115 So. 3d 978 (Fla. 2013)." R:1835.

Third, the court noted the change in USAA's position. "At the fee hearing, however, Mr. Dutton reversed his position and declined to place the

Master Engagement Agreement into evidence. When requested by the Plaintiffs attorneys to attach the Master Engagement Agreement to the record and enter it into evidence, Mr. Dutton refused and stated that the Master Engagement Agreement was not applicable and was not relevant to the claim for attorney's fees. He then testified that the Dutton Law Group had a verbal contingency fee agreement with USAA. Upon request of any evidence in writing of that fee agreement between Dutton Law Group and USAA, Mr. Dutton stated that there was no written agreement or proof of same. No written fee agreement was entered into evidence at the evidentiary hearing." R:1835.

Having noted the procedural history, and the account of the parties' positions and evidence during the Fee Amount Hearing, the trial court made findings of fact based upon what it had heard:

- "Scott Dutton **reversed his position** and testified at the evidentiary hearing **under oath** that the Master Engagement Agreement was not only inapplicable but also irrelevant in his office's fee claim. The Court considers this testimony to render any claim for lodestar attorney's fees under the Master Engagement Agreement null and void. Mr. Dutton very clearly testified that there was no written agreement for attorney's fees that applied to the representation in this matter." R:1837–1838.
- "The testimony clearly demonstrated that the Defendant paid Dutton Law Group $4,000.00 as a flat fee." R:1838.

- "There was no testimony to substantiate any taxable costs by Defendant." *Id*.
- "As to Defendant's witness Mr. Charles Vaccaro, his opinions were limited to a lodestar analysis of the timesheets of Dutton Law Group, those opinions are not relevant due to the abandonment of a claim for reasonable fees under a lodestar approach." *Id*.

Based upon these findings, the trial court awarded USAA $4,000 in attorneys fees (consistent with the Flat Fee Agreement), $0 in costs due to the lack of competent, substantial evidence, and $0 in expert witness costs. *Id*.

# # #

This appeal followed.

SUMMARY OF ARGUMENT

The trial court set USAA's amount of fees based on the only documentary and credible evidence in the record. Given the abuse of discretion standard of review that this Court must apply to the trial court's final judgment on fees — with the nested abuse of discretion standard applicable to the trial court's evidentiary rulings and the competent substantial evidence standard applicable to the trial court's ultimate findings of fact — that should end the Court's inquiry.

Here's how that came to be. USAA, prior to and leading up to the evidentiary hearing, relied on the Master Engagement Agreement with respect to its pursuit of attorney's fees to avoid being limited by the single invoice which depicted the Flat Fee Agreement USAA had with Dutton Law. But at the hearing, USAA jettisoned its reliance on the Agreement, and instead purported to rely on an alleged oral agreement, to further enhance its recovery (while still ignoring the Flat Fee Agreement).

The trial judge, facing a party that "reversed [its] position" during the operative evidentiary hearing, and rejecting the patently self-serving testimony of an alleged *third* agreement for fees (not reduced to writing), sided with the only competent, substantial evidence left in the record. That is, the only invoice for services rendered: the Flat Fee Agreement between USAA and Dutton Law.

Deference to the trial court's findings of fact and determinations of credibility compels affirmance of the Final Judgment on Fees.

ARGUMENT

I. STANDARD OF REVIEW.

A. The Overarching Standard is Abuse of Discretion.

A trial court's award of attorney's fees is reviewed for abuse of discretion standard. *See* *TRG Columbus Dev. Venture, Ltd. v. Sifontes*, 163 So. 3d 548, 550 (Fla. 3d DCA 2015); *Diaz v. Kosch*, 250 So. 3d 156, 168 (Fla. 3d DCA 2018). And evidentiary rulings as well are reviewed for abuse of discretion. *See* *Emaminejad v. Ocwen Loan Servicing, LLC*, 156 So. 3d 534, 536 (Fla. 3d DCA 2015).

The Florida Supreme Court has defined "judicial discretion" as the "power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980). The standard of review applicable to this judicial discretion is explained as follows:

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Id. at 1203; *see also,* *Centex-Rooney Const. Co., Inc. v. Martin Cnty.*, 725 So. 2d 1255, 1258 (Fla. 4th DCA 1999).

B. Discretion Is Not Abused Where There Is Competent, Substantial Evidence in the Record.

The trial court's exercise of discretion must be supported by competent, substantial evidence in the record. *Pazmino v. Gonzalez*, 273 So. 3d 1056, 1059 (Fla. 3d DCA 2019). Said another way, where there is competent, substantial evidence in the record to support the trial court's findings, a trial court cannot be said to have abused its discretion. *See Id.; Pomelli v. Pomelli*, 325 So. 3d 331 (Fla. 3d DCA 2021). The Court's evaluation of the evidence, therefore, is paramount to determining whether the trial court reasonably exercised its discretion. To that end, this Court employs "the highly deferential competent substantial evidence standard of review." *S.M.O. v. Dep't of Children & Families*, 357 So. 3d 773, 777 (Fla. 3d DCA 2023).

Here, the Court's ruling is based largely on its evaluation of testimony over the course of several hearings relating to the fee issue. It is "the function of the trial court ... to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause." *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976). Accordingly, it is not this Court's prerogative "to substitute [its] judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal ...." *Molina v. Fuenmayor*, 3D22-1756, 2023 WL 7172293, at *1 (Fla. 3d DCA Nov. 1, 2023) (citing *Shaw*).

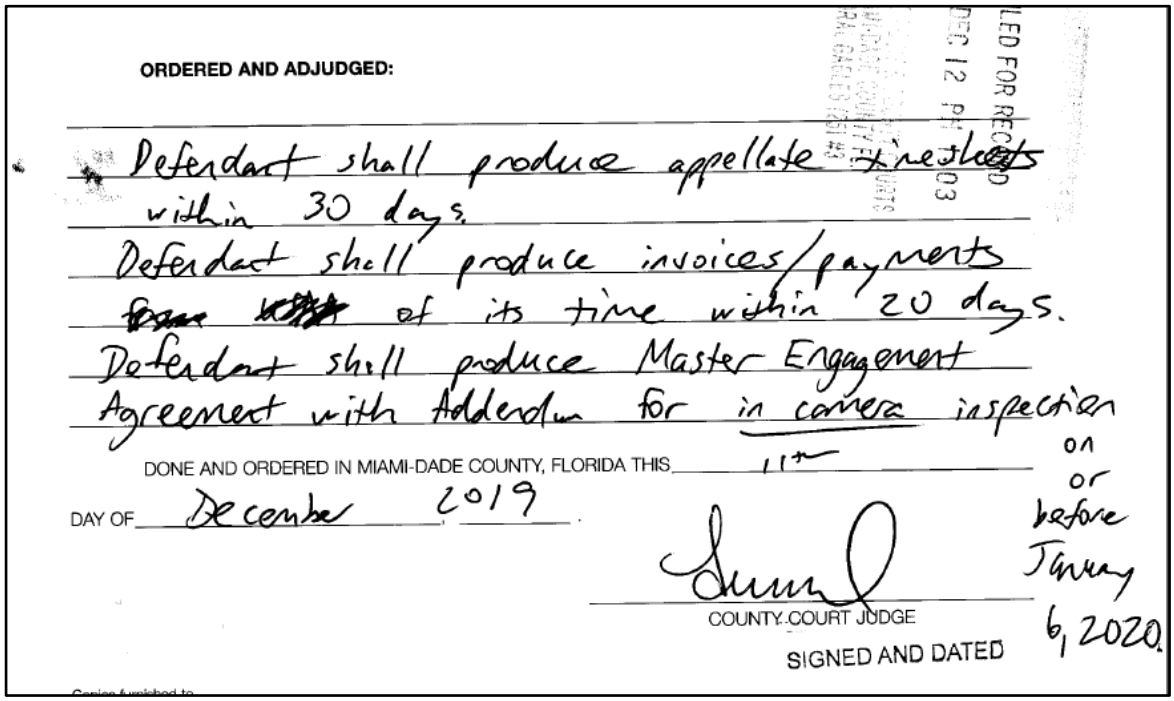
II. THE ORDER GRANTING FEES IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The Order Granting Fees is supported by the evidence of USAA's flat fee arrangement with Dutton Law Group and an evaluation of Mr. Dutton's testimony which ultimately led the trial court to reject the suggestion that Mr. Dutton and USAA had an alternative fee arrangement beyond the $4,000 flat fee agreement. The testimonial evidence — and in some cases, the lack thereof any evidence supporting Mr. Dutton's claims — supports the trial court's ruling in this case and, contrary to Mr. Dutton's insistence, it should not be reevaluated on appeal.

A. The Evidence of Mr. Dutton's $4,000 Flat Fee Agreement was the Only Competent, Substantial Evidence.

The only competent, substantial evidence of fees incurred by USAA was the $4,000 flat fee invoice provided to Stand Up MRI in discovery. All other evidence — following Mr. Dutton's jettisoning of the Master Engagement Agreement — was testimonial in nature and reasonably rejected as incredible by the trial court following Mr. Dutton's wavering and change in his client's position. Simply put, the trial court was correct in determining that USAA did not incur any other fees besides the $4,000, and rejected the notion that USAA had an oral contingency fee agreement with Dutton Law Group.

Recall, prior to the fee hearing, the trial court ordered USAA to produce its "invoices/payments of its time within 20 days" of the order, as seen below:



ORDERED AND ADJUDGED:

Defendant shall produce appellate ~~timesheets~~ within 30 days.
Defendant shall produce invoices/payments ~~from~~ ~~[illegible]~~ of its time within 20 days.
Defendant shall produce Master Engagement Agreement with Addendum for in camera inspection on or before January 6, 2020.

DONE AND ORDERED IN MIAMI-DADE COUNTY, FLORIDA THIS 11th DAY OF December 2019.

COUNTY COURT JUDGE

SIGNED AND DATED

FILED FOR RECORD DEC 12 PM 03

R:669. Responsive to that order, USAA produced a single invoice — the $4,000 flat fee payment made consistent with USAA's agreement with Mr. Dutton. USAA represented that it had complied with the trial court's order above when it produced only that invoice:

DEFENDANT'S NOTICE OF COMPLIANCE WITH COURT ORDER REGARDING INVOICES/PAYMENTS FOR DEFENSE TIME

Comes now Defendant, USAA Casualty Insurance Company, and hereby serves this notice of compliance with this Honorable Court's Order of December 11, 2019 regarding Invoices or Payments for Defense time expended.

1. See attached, invoices from Dutton Law Group to USAA Casualty Insurance Company for travel time and flat fee payment, as well as timesheets and invoices regarding appellate time.

R:670. And USAA described that invoice as a "flat fee payment." R:670.

After its disclosure of the $4,000 payment to Mr. Dutton, USAA represented that it did not have a "written flat fee agreement between Dutton Law Group and [USAA]." R:689. USAA also represented that the Master Engagement Agreement "is the only written retainer agreement, employment contract or contract for representation between Dutton Law Group and Defendant." R:689.

While the Master Engagement Agreement contained what Dutton Law characterizes as an alternative fee agreement (*see* USAA Casualty Insurance Company's Initial Brief ("IB") at 10, 60–62), at the fee hearing Dutton Law jettisoned the Agreement (and thereby the alternative fee agreement clause within). R:1835. Instead, for the first time, Mr. Dutton testified that Dutton Law "had a verbal contingency fee agreement" as USAA's *defense* counsel. R:1835. That verbal contingency fee agreement, argued Dutton Law, entitled its attorneys to recover nearly triple the market rate for defense lawyers handling similar claims. R:1835.

The trial court, sitting as the finder of fact, and hearing the live witness testimony first-hand, rejected the credibility of Mr. Dutton's testimony. R:1838. Having witnessed the complete reversal of Mr. Dutton's position with respect to the Master Engagement Agreement — a patently obvious attempt by Dutton Law to not be limited to the hourly rates contained therein — the trial court declared Dutton Law's claim for fees under the Agreement

"null and avoid" and rejected the testimony that there existed another verbal agreement that provided other terms of engagement. R:1837–1838.[3]

The **only** evidence that remained for the trial court to consider was the competent, substantial evidence of Dutton Law's $4,000 flat fee agreement. Dutton Law points to testimony by USAA's corporate representative, Charles Sprenkle, "that USAA had been billed and had paid $7335.50 to its appellate counsel." IB at 30 (referring to R:1445–1446). To be clear, that testimony related to bills submitted by **other law firms** (Bowman and Brooke LLP and Seipp Flick and Hosley), not the Dutton Law Group. R:1444–1445. Those firms were not bound by the $4,000 flat fee agreement. And the invoices evidencing those payments were **stricken from evidence as hearsay**. R:1446. They have nothing to do with Dutton Law's claim for trial fees.

The $4,000 flat fee invoice served as the *only* evidence of Dutton Law billing USAA and Dutton Law's own characterization of that invoice as a "flat fee payment" served as the *only* evidence of the retainer arrangement between Dutton Law and USAA. The trial court's only other alternative was to find that Dutton Law, as the movant for its own fees, failed to satisfy its own burden of proving the amount of fees and thus award Dutton Law $0 in fees. The trial court could have done that. *See, e.g.,* *Warner v. Warner*, 692

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[3] The trial court also noted several inconsistences and shortcomings in Dutton Law's testimony regarding its claim for a lodestar amount of fees. *See* R:1835–1838. Those issues also present a basis for rejecting Dutton Law's testimony of hours it expended on the case, *see* Argument II. C., *infra*.

So. 2d 266, 268 (Fla. 5th DCA 1997) ("The party failing to establish its attorney's fees claim is not entitled to a second opportunity to make the requisite showing.") Instead, the trial court relied on the only *competent*, substantial evidence in the record.

B. Section 768.79, Florida Statutes, Limits Defendants to Attorney's Fees and Costs Actually *Incurred* During Litigation.

Dutton Law insists that section 768.79, Florida Statutes, entitles it to claim its full lodestar amount of fees despite not ever billing USAA for those fees. IB at 58–63. That is not the law.

Section 768.79 allows for a defendant to recover an amount of "reasonable costs and attorney's fees *incurred*" by the defendant or "on the defendant's behalf pursuant to a policy of liability insurance or *other contract*…." § 768.79 (emphasis added). By its plain language, the statute requires two things depending on who is claiming the fees. If the fees are being claimed by the defendant, those fees must be "incurred" by the defendant. *Id*. If the fees are being claimed "on the defendant's behalf," those fees must also be "incurred", and they must be incurred "pursuant to a policy of liability insurance or other contract." *Id*.[4]

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[4] It must be stated that section 768.79, as a statute imposing a penalty on parties in derogation of the common law, "must be strictly construed in favor of the one against whom the penalty is imposed and is never extended by construction." *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 223 (Fla. 2003). *And see Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003).

That is consistent with this Court's law. In *Suarez v. Citizens Prop. Ins. Corp.*, 275 So. 3d 688 (Fla. 3d DCA 2019), this Court held that a defendant (an insurer) "shall only recover those attorney's fees incurred and actually paid or payable to its attorneys by the Insurer, from service of the 2016 proposal for settlement through the date of the order granting entitlement to fees." *Id*. at 689. The Court referred to the dictionary definition of "incurred" as employed in *Reliance Mut. Life Ins. Co. of Ill. v. Booher*, 166 So. 2d 222, 224 (Fla. 2d DCA 1964) which defined "incurred" as "[t]o meet or fall in with, as something inconvenient or harmful; become liable or subject to; to bring down upon oneself; as, to incur debt, danger, displeasure, penalty, etc." *Id*. Which is to say, the trial court determined that fees owed under section 768.79 had to be an actual "debt" owed by the defendant—either a "debt" owed or a debt "actually paid or payable to its attorneys." *Suarez*, 275 So. 3d at 689.

USAA insists that *Suarez* is distinguishable because *Suarez* was decided on a "limited and proper concession of error" by the Appellee. *Id*. *And see* IB at 29–32. How the Court decided *Suarez* does not matter. The point is that the Court announced the rule of law and a binding interpretation of section 768.79: Fees can only be claimed by a defendant if those fees are in fact incurred.

USAA (and Dutton Law Group) had the opportunity to demonstrate what fees USAA actually incurred at the fee hearing. In fact, Stand Up MRI

asked USAA's corporate representatives if Dutton Law "submit[ted] any invoices that contained attorney's fees, hours and time entries to USAA in this case" and USAA (through Dutton Law Group) **objected** to the question. R:1447. Ultimately, USAA did not utilize its corporate representative to admit any evidence of a debt incurred by USAA payable to its attorneys.

As the party with the burden of proving the amount of fees incurred during litigation, USAA failed to put forward any competent, substantial evidence of that amount. Based on that lack of testimony, and consistent with this Court's precedent, the trial court limited USAA's recovery to what fees USAA actually incurred: the $4,000 flat fee payment invoiced by the Dutton law Group.

C. Mr. Dutton's Other Arguments Are Superfluous.

(1) The Trial Court Did Not "Mischaracterize" the Testimony and Evidence Presented at the Fee Amount Hearing.

USAA claims that the trial court "mischaracterize[d]" what transpired at the Fee Amount Hearing when it determined that USAA (through Mr. Dutton) reversed its position by no longer relying on the Master Engagement Agreement. IB at 55–58. USAA claims that the Agreement is protected by the "attorney-client privilege" and its admission into evidence would have been harmful. IB at 56–58. The argument goes: "Mr. Dutton should have been allowed to rely upon both the MEA and the trial court's prior rulings at the evidentiary hearings." IB at 56. But, not only is the trial court's evaluation

of credibility and testimony exclusive to it alone, but Mr. Dutton's arguments and testimony at the hearing leave no room for reinterpretation.

The Court will recall that USAA refused to put the Master Fee Agreement into evidence, arguing that it was "irrelevant to these proceedings." R:1412. USAA, through Dutton Law, unequivocally stated that the Master Engagement Agreement had nothing to do with the fee proceedings:

> MR. DUTTON: And irrelevant to the proceedings. And irrelevant to just the conditions of compensation by in between our law firm and our client.
>
> * * *
>
> MR. DUTTON: I'm not referring to it. Your Honor, I will not be referring to it.
>
> * * *
>
> MR. DUTTON: Your [Honor], the master engagement agreement, again, for purposes of the record, is an attorney-client privileged document. That it doesn't embody what Mr. Berger has just said.
>
> He's mischaracterized, misstated anything that may be contained within that document. It's irrelevant to these proceedings. These proceedings travel upon a different arrangement than has been alluded to by Mr. Berger in his cross examination.

R:1413–1415.

While USAA correctly recalls that it relied on the Master Engagement Agreement during the trial court's "prior rulings," it abandoned that reliance

at the Fee Amount Hearing. The idea that "Mr. Dutton should have been allowed to rely upon both the MEA and the trial court's prior rulings at the evidentiary hearings" is, accordingly, a strawman argument. IB at 56. Mr. Dutton did not try to rely on the Agreement at the Fee Amount Hearing, or otherwise rely on findings made by the trial court in prior rulings. IB at 56. USAA chose not to "refer[]" to it because, in its view, it was "irrelevant to these proceedings." R:1413–1415.

Consequently, it is beyond the pale for USAA to argue that "the evidence and testimony adduced at the evidentiary hearings was unequivocal… USAA and the Dutton Law Group had an agreement whereby Dutton Law Group was paid an initial fee of $4,000 and entitled to certain hourly rates thereafter. If Dutton Law Group positioned USAA as the prevailing party, Dutton Law Group would be entitled to $300 per hour for partners, $275 per hour for senior associates, $250 per hour for associates, and $110 per hour for paralegals or the amount awarded by the court as a reasonable fee, whichever was greater." IB at 57. Those were the terms of the Master Engagement Agreement which, at the time of the Fee Hearing, USAA claimed was "irrelevant" to the trial court's consideration.

(2) The Trial Court Acted Within its Discretion in Declining to Assess USAA's Expert's Fees as a Cost.

USAA argues that the trial court erroneously refused to tax the fee charged by USAA's expert to testify at the fee amount hearing. IB at 44–50. The Court should reject USAA's suggestion that an expert's fee is always

taxable regardless of the relevancy of their testimony. As the trial court determined in its Order Granting Fees, USAA's expert only opined on the issue of USAA's requested lodestar amount—an amount that was entirely contingent on a fee clause that was jettisoned by USAA at the fee amount hearing. USAA's change in position rendered its own expert's testimony entirely inconsequential and irrelevant. The trial court justly excluded the expert's fee as a taxable cost in an exercise of its discretion.[5]

"Costs are taxable only where authorized by statute or rule." *Junkas v. Union Sun Homes, Inc.*, 412 So. 2d 52, 53 (Fla. 5th DCA 1982). The Statewide Uniform Guidelines, adopted as a Florida Rule of Civil Procedure, provide another avenue to recover costs albeit with the caveat that the movant — here, USAA — shoulder the "burden … to show that all requested costs were reasonably necessary either to defend or prosecute the case at the time the activity precipitating the cost was undertaken." Fla. R. Civ. P. App. II. Which is to say, USAA carried the burden of proving that each of its costs were expressly permitted by statute or under the Statewide Uniform Guidelines and were "reasonably necessary to … prosecute [the fees] at the time the activity precipitating the cost was undertaken." *Id*.

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[5] Generally, a "trial court's award of costs is reviewed by appellate courts for an abuse of discretion." *Albanese Popkin Hughes Cove, Inc. v. Scharlin*, 141 So. 3d 743, 745 (Fla. 3d DCA 2014).

Consider what the Florida Supreme Court has held regarding the trial court's discretion to assess these types of fees as costs:

> We hold that pursuant to section 92.231, expert witness fees, **at the discretion of the trial court**, may be taxed as costs for a lawyer who testifies as an expert as to reasonable attorney's fees. **We do not hold that such expert witness fees must be awarded in all cases**. Generally, lawyers are willing to testify gratuitously for other lawyers on the issue of reasonable attorney's fees. This traditionally has been a matter of professional courtesy. An attorney is an officer of the court and should be willing to give the expert testimony necessary to ensure that the trial court has the requisite competent evidence to determine reasonable fees. **Only in the exceptional case where the time required for preparation and testifying is burdensome**, should the attorney expect compensation.

Travieso v. Travieso, 474 So. 2d 1184, 1186 (Fla. 1985) (emphasis added).

Given the Florida Supreme Court's clear pronouncement of the issue, the trial court could not have abused its discretion declining to award fees as a cost where USAA's attorney did not testify to having faced "burdensome" time preparing and testifying for the issue and, even more damning, testified to an issue that was rendered moot by USAA's litigation strategy.

USAA does not present a compelling reason why the trial court abused its discretion under these circumstances, and the arguments it does offer are easily refuted by the record. First, USAA claims that "the trial court stated that USAA's fee expert, Charles Vaccaro, Esquire, was never tendered as an expert or admitted as an expert in this matter." IB at 46 (citing R:1838). Second, USAA claims that the trial court incorrectly determined that

Mr. Vacarro testified that he did not have an "expectation of compensation for his time." *Id*. (citing R:1838). Neither point moves the needle.

Ultimately, the record confirms that Mr. Vacarro's testimony related only to USAA's jettisoned claim for a lodestar amount of fees, and that Mr. Vacarro never did testify that "he had an expectation of compensation for his time during the hearing," or that "it was [an] undue burden for him to attend the fee hearing or that time was taken away from his legal practice," consistent with *Travieso*, 474 So. 2d at 1186. Given that's the case, the trial court acted well within its discretion declining to award his fees as a cost.

(3) Stand Up MRI Did Not "Invalidate" USAA's Contract with Dutton Law Group.

USAA contends that Stand Up MRI did not have "standing" to "invalidate" USAA's contract with Dutton Law Group when it prevailed on the trial court to award only USAA's $4,000 Flat Fee Agreement with Dutton Law. IB at 48–50. The argument is miscast and, frankly, confusing. USAA appears to suggest that the Master Engagement Agreement was invalidated but that was not the case. *See* IB at 49 (describing the Dutton Law Group's reliance on the Master Engagement Agreement prior to the Fee Amount Hearing). But it was USAA, itself, that jettisoned the Agreement and refused to enter it into evidence at the Fee Amount Hearing. There was simply no agreement invalidated by the trial court.

(4) The Trial Court's Order Granting Fees Can Also Be Affirmed Under the *Tipsy Coachman* Doctrine.

Finally, even putting aside the trial court's weighing of credibility and evidence following USAA's 180º reversal, the trial court also noted several inconsistences and shortcomings in USAA's testimony and evidence regarding its claim for a lodestar amount of fees. *See* R:1835–1838. Those issues also present a basis for rejecting Dutton Law's testimony of hours it expended on the case, allowing this Court to affirm the trial court's Order Granting Fees under the tipsy coachman doctrine. *See* *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) (holding that "an appellate court, in considering whether to uphold or overturn a lower court's judgment, is not limited to consideration of the reasons given by the trial court but rather must affirm the judgment if it is legally correct regardless of those reasons").

Among the many factual findings made by the trial court relevant to USAA's claim for a lodestar amount of fees, the following are supported by the record on appeal and offer a basis by which this Court "must affirm the judgment" on fees:

- "[USAA's expert] testified that he was not familiar with the other lawyers for the Dutton Law Group aside from Scott Dutton." R:1836 (supported by the record at R:1692–1698)
- "Mr. Vaccaro's testimony regarding hourly rates blended Plaintiff's lawyers and insurance defense lawyers, considering them one and the

same as far as rates go." R:1836 (supported by the record at R:1698, R:1712, R:1734)

- "Mr. Vaccaro also did not review any of the summary judgment motions or hearing notebooks, which comprised a significant chunk of time billed by Dutton Law Group. Mr. Vaccaro was also not aware that Dutton Law Group had billed substantial time for an amended motion for summary judgment, which was copied and pasted substantially from the original motion for summary judgment and other previously filed motions." R:1836 (supported by the record at R:1733–1735).
- "Mr. Vaccaro stated that he considered the factors under Florida Rule of Civil Procedure 1.442 in determining a reasonable fee but placed zero weight on any of the factors. He did not reduce Dutton Law Group's fees by one penny because of the 1.442 factors." R:1836 (supported by the record at R:1688–1744 *and compare with* R:1473–1475, Stand Up MRI's expert testifying as to the Rule 1.442 factors).

The point is that even if USAA had maintained its reliance on the Master Engagement Agreement and been entitled to a lodestar amount, there were sufficient defects in USAA's testimony and evidence to justify the trial court's ultimate award of fees or to altogether reject USAA's claim for fees.

These factual findings are not challenged on appeal—nor could they be. The trial court's findings are supported by the record and it, as the trier of fact, has the exclusive ability "to evaluate and weigh the testimony and

evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause." *Shaw*, 334 So. 2d at 16. USAA cannot "substitute [its] judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal" or ask this Court to do the same. *Molina*, 2023 WL 7172293 at *1.

CONCLUSION

The Order Granting Fees should be affirmed in all respects.

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CERTIFICATE OF SERVICE

I certify that, on December 7, 2023, pursuant to Fla. R. Gen. Prac. & Jud. Admin. 2.516, this Answer Brief was served via the Florida courts ePortal on:

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I hereby certify that this brief was prepared in Arial, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure, and does not exceed 13,000 words, in compliance with Rule 9.210(a)(2)(B).

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